IN THE

SUPREME COURT OF THE UNITED STATES

No. 807

DeWITT E. TAYLOR,

Petitioner,

versus

JOHN L. FAHS, individually and as United States Collector of Internal Revenue, for the District of Florida,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PHILIP HAMAN, P.A.
908 Langford Building
Miami 32, Florida
Attorney for Petitioner

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

May it Please This Honorable Court

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

This case was tried before the U. S. District Court for the Southern District of Florida without a jury under Sections 122 and 1340, Internal Revenue Code, 1939. The

District Judge found that the Petitioner was a dealer in real estate and that his losses could be carried back to previous years. The opinion of the District Judge is appended (1A).

The Circuit Court of Appeals (Fifth Circuit) said he was not a dealer and reversed the District Court. (App. 6A).

JURISDICTION

The Jurisdiction of this Court is invoked under Title 28 U.S.C. 1254, because the decision of the Circuit Court of Appeals in this case clearly violates the clearly erroneous doctrine of Rule 52, Rules of Civil Procedure (infra.) adopted by this Court and is directly opposed to the decision of McAllister vs. U. S. 99 Law Ed. 20, 348 U. S. 19, 75 S. C. 6. Headnote 1. "In reviewing a judgment of a trial court sitting without a jury, the Court of Appeals may not set aside the judgment below unless clearly erroneous; 52(a) of the Federal Rules of Civil Procedure."

The inferences drawn by the District Judge were supported by an abundance of evidence and the Appellate Court had no authority to substitute its own conclusions for those of the District Judge who tried the case without a jury. Helvering vs. National Grocery Co., 304 U.S., 282, 82 Law Ed. 1346, 58 Sup. Ct. 932; Helvering vs. Ranking 295 U.S. 123, 79 Law Ed. 1343, 55 Sup. Ct. 732; Helvering vs. F. & R. Lazarus & Co., 308 U.S. 252, 84 Law Ed. 226, 60 Sup. Ct. 209; Wilmington Trust Co. vs. Helvering 316 U.S. 164, 86 Law Ed. 1352, 62 Sup. Ct. 984; Regensburg vs. Commissioner of Internal Revenue (C. C. A. 2d) 144 F. 2d. 41; Gray vs. Powell, 314 U.S. 402,

86 Law Ed. 301, 62 Sup. Ct. 326; Mississippi Valley Barge Line Co. vs. United States 292 U.S. 282, 78 Law Ed. 1260, 54 Sup. Ct. 692; Shields vs. Utah Idaho C. R. Co. 305 U.S. 177, 83 Law Ed. 111, 59 Sup. Ct. 160; Swayne & Hoyt vs. United States, 300 U.S. 297, 81 Law Ed. 659, 57 Sup. Ct. 478; Parker vs. Motor Boat Sales, 314 U.S. 244, 86 Law Ed. 184, 62 Sup. Ct. 221; National Labor Relations Bd., vs. Hearst Publications, 322 U.S. 111, 88 Law Ed. 1170, 64 Sup. Ct. 851; Helvering vs. Scottish American Investment Co. (4th Cir.) 139 F. 2d 419, 89 Law Ed. 113, 323 U. S. 119.

If Circuit Courts of Appeal are required to follow the findings of fact of government boards where different inferences can be drawn, they should of United States District Judges.

The Circuit Court of Appeals for the Fifth Circuit in this case, flagrantly violated Rule 52, promulgated by this Court in an effort to discourage Courts of Appeal from wasting their time and Appellate Court energy unravelling conflicting factual inferences.

"Rule 52, Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of appropriate judgment . . . . . **Findings of fact shall not be set aside unless clearly erroneous".** (Emphasis added). Amendments to Rules of Civil Procedures adopted by the U. S. Supreme Court, December 27, 1946. See Appendix V. 91 Law

Ed. 2113, at p. 2119, 11 U. S. S. Ct. Dig. 359 p. 453.

See Advisory Committee's note to Rule 52.

"Findings by the Court.

. . . . . The rule stated in the third sentence of subdivision (a) accords with the decisions on the scope of the review in modern equity practice. **It is applicable to all classes of findings in cases tried without a jury** whether the finding is of a fact concerning which there was conflict of testimony, **or of a fact deduced or inferred from uncontradicted testimony** (emphasis added). See Silver Kine Coalition Mines Co. vs. Silver King Consolidated Mining Co. (Eighth Circuit) 204 Fed. 166, Headnote 5, Cert. denied 229 U.S. 624; Warren vs. Keep 155 U.S. 265 (1894); Furrer vs. Ferris 145 U.S. 132 (1892); Tilghman vs Proctor 125 U.S. 136, 149 (1888); Kimberly vs. Arms, 129 U.S. 512, 524, (1889). Compare Kaeser & Blair Co., Inc. vs. Merchants Assoc. 64 Fed. (2d) 575, 576 (C.C.A. 6th, 1933); Dunn vs. Trefrey, 260 Fed. 147, 148 (C.C.A. 1st, 1919)." 11 U.S. Sup. Ct. Digest 453.

This rule is an effort to set up a similar rule for the government of Circuit Courts of Appeal in reviewing all findings of fact by lower Courts as was laid down by this Court for the government of Tax Courts in Commissioner of Internal Revenue vs. Scottish American Investment Co., 89 Law Editions 113, 323 U.S. 119, where this Court stated the rule to be

"Moreover, this case exemplifies one type of factual dispute where judicial abstinence should be pronounced. The decision as to the facts in this case, like analogous one that preceded it, is of little value as a precedent. The factual pattern is too decisive and too varied from case to case to warrant a great expenditure of Appellate Court energy on unravelling conflicting factual inferences."

The Court of Appeals not only violated the "clearly erroneous" rule but also cites its own previous decisions wherein it has adopted a practice of violating the "clearly erroneous" rule; See Galena Oaks Corp. vs. Scofield (Fifth Circuit) 218 F. 2d 217, 291; Goldberg vs. Commissioner of Internal Revenue (Fifth Circuit) 223 F. 2d 709; Consolidated Naval Stores Co. vs. Fahs (Fifth Circuit) 227 F. 2d. 923, 925; Smith vs. Deinn (Fifth Circuit) 224 Fed. 353. Thus the Fifth Circuit Court of Appeals has adopted the practice of violating the "clearly erroneous" doctrine promulgated by the United States Supreme Court in Rule 52. (See Fahs vs. Taylor P. 6 this Appendix).

THE ONE QUESTION INVOLVED HERE

The One Question presented to this Court is:

Where different inferences of fact may be made by a trial Judge, may the Circuit Court of Appeals ignore and violate Rule 52 or similar rules of law or evidence which attempt to restrain an Appellate Court from reversing a Trial Court's finding of fact unless "clearly erroneous."

COURT WASTING ENERGY UNRAVELLING CONFLICTING FACTUAL INFERENCES

The Fifth Circuit Court of Appeals is adopting and has adopted the practice of making

> "a great expenditure of Appellate Court energy on unravelling conflicting factual inferences."

The Circuit Court stated in its opinion that it was freed of the "clearly erroneous" doctrine. (App. Page 9A).

It is here suggested that the failure of Circuit Courts of Appeal to follow the "clearly erroneous" doctrine is the cause of congestion in Circuit Courts generally: That other Courts of Appeal will naturally follow the Fifth Circuit in ignoring and violating the "clearly erroneous" doctrine laid down in Rule 52 further adding to the congestion in Appellate Courts.

Very seldom does an Appellate Court so brazenly proclaim its ignoring and violating the "clearly erroneous" rule as was done in this case.

The Circuit Courts of Appeal should devote their energies to deciding Questions of law not simple questions of fact which the District Judge is better qualified to decide.

THE QUESTION PRESENTED BELOW

The one question presented to the two Courts below was:

Where a dealer and sub-divider of real estate inherits an undivided one-half interest in his deceased father's subdivision restricted to the building of residences and where the character of the neighborhood has changed to business and the lots in that subdivision are no longer saleable and the Petitioner is instrumental in building a filling station for the two-fold purpose of (1) selling the lot and filling station, and (2) breaking the residential restrictions as to the remaining lots in the subdivision and Petitioner succeeds in both and sells the filling station (which had been built for the purpose of sale) at a loss "is the filling station a part of the Petitioner's property which he held for sale to the public as a dealer?"

The evidence showed that not only was DeWITT E. TAYLOR a sub-divider and dealer in real estate from 1925 until 1952, but that his father before him was likewise a subdivider and dealer in real estate for more than 30 years prior to his death in 1927.

The Petitioner was asked

"Q. What did you do with this property that you purchased?

A. I sub-divided the property, — detached the property; placed roads on the property; created a town site surrounded by five acre farms, more or less, in size, and sold to Hungarians who were interested, through advertising in the American Newspaper in New York City, which had a big circulation in New York, and surrounding territory, and in Cleveland, Ohio. I ran some excursions to interest them in settling in the

town site, — the families of men that were retired or on pension, — settling on farm sites to raise truck crops for resale.

The Court: That was in 1925?

The Witness: Proceeding from 1925. I sold three lots in the town site in December of last year. (1954).

Q. (By Mr. Paine) I hand you two plats and ask you to identify them.
A. Yes, sir.

Q. Will you examine them both; did you subdivide that property?
A. Sure.

Q. As per those plats?
A. Yes, sir.

Q. How many people live over there now in that town site acreage?
A. In the farms and town site, approximately 1,500.

(Transcript of Testimony—Pgs. 3 and 4.)

Whereupon the plat of the town of Kossuthville and Kossuthville farmsites was introduced into evidence. Plaintiff's Exhibits 6 and 7. (The town probably should have been called Taylorville in honor of the Petitioner who founded and built the town and was still selling lots from his Kossuthville townsite in 1954).

"This case was tried by the Court below without a jury upon a stipulation which, among other things, provided:

"5. The Plaintiff's net loss for the year 1943 was $23,307.29.

6. The only questions of fact and law to be presented to the above court upon trial of the above case are those showing whether or not the Plaintiff is entitled to carry back the 1944 loss of $23,307.29 to the years 1942 and 1943, as a carry-back loss (R. 23)".

This stipulation should preclude any contest over the amount of the net loss or the ownership of the property that gave rise to the net loss.

The Plaintiff's 1944 income tax return shows the following losses from the sale of real estate.

"LOSSES FROM REAL ESTATE SALES:

		Losses	Total
Farm Sales—Kossuthville	5,620.00		
Less: Cost of Farms Sold	37,206.60	(31,586.60)	
Lots Sold, Townsite—Kossuthville	1,440.50		
Less: Cost of Lots Sold	3,768.52	(2,328.02)	
Tavares Lot—Cost 1925	30,000.00		
Less: Mortgage cancelled 9/25/44	14,800.00	(15,200.00)	
S/W corner Woodward & Taylor Aves—Detroit		(26,619.98)	(75,734.60)"

The only questions presented to the Court below were whether the Petitioner was a sub-

divider and dealer in real estate as to his 1944 real estate losses which amounted to over $75,000 (1944 tax return)."

DeWITT E. TAYLOR was established as a real estate dealer when he subdivided the Town of Kossuthville into city lots and the surrounding farm sites into the Kossuthville farms. He testified that more than fifteen hundred (1500) people live either in the Town or on the farm sites which he subdivided and sold. He was still selling lots from his Kossuthville subdivisions in 1955 at the time of the trial.

The Petitioner's father was likewise a sub-divider and dealer is conclusively shown by the record. Transcript of Testimony Pages 5-6, and Plaintiff's Exhibits 8 and 9. But the lots in his father's subdivision were not saleable because they were not business lots but were restricted to residence purposes. So Petitioner who owned one-half interest in the remnants of his father's real estate had a filling station built for the two-fold purpose of (1) selling the filling station, and (2) to make the remaining lots saleable. The two-fold purpose in building the filling station succeeded for the residence restrictions were broken, resulting in the sale of the filling station in 1944.

The District Court and the Circuit Court of Appeals disagreed as to whether the filling station was part of his real estate holdings as a dealer and entitled to use the loss as a carry-back loss. Unless the District Court was clearly erroneous, the Circuit Court of Appeals violated Rule 52.

The District Judge who held a pre-trial conference

on the matter and listened to all the oral testimony and examined all the exhibits and tried the case without a jury, held that the filling station which had been built for sale was part of the Petitioner's real estate holdings which he held for sale as a dealer to the public.

The Circuit Court of Appeals held that the filling station was not part of the Petitioner's real estate holdings which he held for sale as a dealer to the public, and reversed the District Court's finding of fact.

In King vs. Commissioner, 189 Fed. 2d 122, from the Fifth Circuit, where the taxpayer built houses originally for the purpose of renting but later sold them, he was held to be a dealer.

In Mauldin vs. Commissioner, 195 Fed. 2d 714, at page 717, the court said:

> "Admittedly, Mauldin originally purchased the property for purposes other than for sale in the ordinary course of trade or business. When, however, he subdivided and offered it for sale, he was undoubtedly engaged in the vocation of selling lots from this tract of land at least until 1940. As against his contention that he ceased to engage in the business after 1940, the record evidence shows that he sold more lots in 1945 on a sellers market without solicitation than he did in 1940 on a buyers market. It seems fairly inferable from the record that **at all times he had lots for sale**, and that the volume sold depended primarily upon the prevailing economic conditions, brought on by wartime activities and their

aftermath. It is true that he was in the lumber business, but his returns plainly show that a substantial part of his income was derived from the sale of the lots. In these circumstances, we cannot say that the Tax Court's conclusions are without factual basis." (Emphasis added.)

The decisions are affirmed.

REAL ESTATE DEALER'S PROPERTY HELD CHANGED TO CAPITAL ASSETS BY MERELY PLEDGING IT.

Can Real Estate Dealer change the nature of his Real Estate Holdings to Capital Assets by Pledging Them as Security for Personal Obligations?

The main contention of the respondent throughout these proceedings is that the nature of the Petitioner's holding of the fourteen parcels of Michigan property was changed to Capital Assets by the mere pledging of those fourteen parcels as security for the payment of child support and alimony payments to the his ex-wife prior to her re-marriage (actually prior to the sale of this property).

And the Circuit Court of Appeals fell for that argument hook, line and sinker in its apparent anxiety to rule with the respondent. Thus the Circuit Court of Appeals for the Fifth Circuit quite clearly indicates a real estate dealer's property is a capital asset if it is pledged for personal uses. The Court says — Page 10A

"this property was at all times here relevant put to the highly personal and restricted use of

standing as security for his alimony payments and with actual legal title in a trustee for that purpose, produces a result that cannot justify a finding by the trial court or by us that this lot* was held by the taxpayer for sale in the conduct of any business regularly engaged in by him."

*(Note: The lot referred to is the lot upon which the filling station was built for the two-fold purpose of (1) effecting the sale of the lot itself, and (2) making the remaining lots in the subdivision saleable).

I am sure that no other Court of Appeals, no Federal District Court and no Tax Court has ever indicated that the nature of the holdings of a real estate dealer can be changed to capital assets by merely pledging his real estate holdings for personal uses. Real estate dealers in this Circuit are certain to try this method of changing their subdivision and other real estate holdings to capital assets.

The trust deed itself proves that the fourteen parcels were pledged as security and the property, the filling station was sold. The fact that the filling station was sold indicates that it continued to be saleable.

There is no basis whatever for the Circuit Court of Appeals holding that the pledge of Petitioner's fourteen (14) parcels of Michigan real estate in any way affected the character of holding. The filling station here involved still had been built for the two-fold purpose of sale and making other lots saleable.

Unless the Circuit Court of Appeals is reversed, real estate subdividers and dealers throughout the country will be justified in changing their holdings to capital assets by pledging them for their personal loans, or other personal uses.

Both Lower Courts, the Petitioner and Respondent all agree that if Petitioner held the real estate properties listed on his 1944 Income Tax Return as a dealer then the losses were net operating losses under Section 122 of the Internal Revenue Code 1939.

CONCLUSION

It is therefore submitted that the District Court properly inferred from the evidence that the petitioner was a dealer as to the filling station which had been built for the two-fold purpose of (1) selling the same and (2) making the remaining lots in that subdivision saleable, as well as to the lots in his other subdivisions and that the loss was a carry-back loss under Sec. 122, Internal Rev. Code 1939.

Respectfully submitted,

PHILIP ELIJAH PAINE

PROOF OF SERVICE

The undersigned, of counsel for the Petitioner in the within Petition for Certiorari, hereby certify that four copies of the above and foregoing Petition for Writ of Certiorari has been served upon the Honorable James L. Guilmartin, United States Attorney, Post Office Building, Miami, Florida, this_____day of February, 1957.

PHILIP ELIJAH PAINE

APPENDIX

(Title Omitted)

On April 4, 1955 FINDINGS OF FACT and CONCLUSIONS OF LAW was filed by the District Judge in the words and figures as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action for claimed refunds of income taxes paid, plus interest, and costs, was tried by the Court without a jury. There appeared as attorney for the plaintiff, Philip Paine, Miami, Florida, and as attorney for the defendant, Harlan Pomeroy, Special Assistant to the Attorney General, Washington, D. C. The case was tried on the issues made by the pleadings, oral testimony and other evidence submitted to the Court. The Court, having concluded that its judgment should be for the plaintiff, makes the following Findings of Fact and Conclusions of law.

FINDINGS OF FACT

1. The plaintiff is an individual residing in Polk County, Florida. This action is brought under Title 28, U.S.C., Section 1340. Plaintiff seeks recovery and refund of internal revenue taxes for the years 1942 and 1943, which refund he now claims by virtue of a loss incurred in 1944 from the sale of real estate. Actually, the loss in dispute arose out of the sale of plaintiff's half interest in a lot in Detroit, Michigan. Plaintiff claims that the loss constituted a "net operating loss" within the purview of Sec-

tion 122 of the Internal Revenue Code, and therefore entitles him to a carry-back of the said net operating loss as a deduction for the years 1942 and 1943, which would effect a recomputation of his taxes for those years. Acting upon such claim, plaintiff filed claims of refunds for the two years and upon denial brought this action.

2. Plaintiff's father died in 1927, leaving certain remnants (five lots) of a subdivision in Detroit, Michigan, to the plaintiff and his sister. The lots his father sold in the subdivision had been treated by his father as property in a general real estate business. After inheriting the property plaintiff entered into a long series of activities to change the classification of the lot zoning from that of residential to one of business. On a lot in the subdivision situated at the southwest corner of Woodward and Taylor Avenues, he and his sister built a filling station to test the zoning restrictions. This resulted in litigation in which the property was ultimately rezoned as business property. In 1944 the property in question was sold as business property, and plaintiff sustained a loss of $26,619.98, which, after figuring other gains and losses, resulted in a claim of a net business loss of some $23,000 for the year 1944.

3. During 1944 and prior thereto the plaintiff engaged in the following activities:

(a) He had a subdivision in Florida consisting of farm lots and city lots (now, the Town of Kossuthville) which property he had been selling from time to time since 1925;

(b) He had a citrus grove in Florida which he had operated for a number of years;

(c) He was a member of a partnership which operated a general store in Michigan.

4. In 1944, plaintiff sold some farm lots and town lots in Kossuthville Subdivision, a lot in Taveres, Florida, and the property in question located at the Southwest corner of Woodward and Taylor Avenues, Detroit, Michigan.

5. The plaintiff had claimed that during the years in question he was in the real estate business, and no evidence was presented that he had ever declared any capital gains or losses arising out of the sale of any of this real estate, including the Detroit subdivision in question.

6. The plaintiff, having established that he was actively engaged in the real estate business during the year 1942 through 1944, and for many years prior thereto, and there being no evidence to indicate that the lots involved in the Michigan inheritance were ever treated other than as lots held for sale in the ordinary course of his general real estate activities, it is the finding of this Court that they were held and disposed of in the course of one of his usual businesses.

7. The most important business in which the plaintiff engaged in 1944 was the sale of real estate, and the fact that he sold property elsewhere than in Florida, where his main real estate efforts were conducted, is no bar to his claim; especially where there is no evidence that he intended to handle the Detroit property in any way differently than he handled his Florida property which admittedly was being sold in the usual course of a going real estate business. In plaintiff's tax returns for the years 1942 and 1943, he listed his business as "citrus", "real estate", "securities" and "merchant".

8. Before the trial the parties stipulated in writing and filed herein in this cause, a stipulation which provided, among other things:

"1. The plaintiff's net income for the year 1942 was $11,720.87.

"3. The plaintiff's net income for the year 1943 was $33,913.28.

"5. The plaintiff's net loss for the year 1944 was $23,307.29.

"6. The only questions of fact and law to be presented to the above Court upon trial of the above case are those showing whether or not the plaintiff is entitled to carry back the 1944 loss of $23,307.29. to the years 1942 and 1943, as a carry-back loss.

"7. It is further stipulated and agreed that should the Court decide that plaintiff is entitled to carry back the 1944 loss of $23,307.29 [sic] to 1942 and 1943, the parties will compute the amount of the judgment to the plaintiff's favor and submit the computation to the Court for approval."

The question involved here is whether or not the plaintiff can claim the loss occasioned through the sale of the Detroit property as a net operating loss within the meaning of Section 122 of the Internal Revenue Code. It is my opinion that he can.

9. The Court is impressed that the evidence indicates that—

(a) the plaintiff took over and continued the father's business of selling out the remnants of the subdivision and in so doing he must be considered as having adopted the same tax position that his father was in, namely, operating a real estate business;

(b) The record is devoid of any indication of election except that the plaintiff handled the Detroit property as part of his real estate business.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this cause and of the parties hereto.

2. The plaintiff is entitled, under Section 122, Internal Revenue Code, to carry back the 1944 net operating loss deduction to the years 1942 and 1943, so as to effect a recomputation of plaintiff's income taxes for those years.

3. Upon submission to the Court of a stipulation as to the amount of the recovery, judgment shall thereupon be entered for such refund sums, together with interest, as provided by law.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this the 30th day of March, 1955.

EMETT C. CHOATE
United States District Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15946

JOHN L. FAHS, individually and as United States Collector of Internal Revnue for the District of Florida,

Appellant,

versus

DeWITT E. TAYLOR,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(November 30, 1956.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal by the Internal Revenue Director for the State of Florida from a judgment in favor of the taxpayer following a suit for the recovery of income taxes for the years 1942 and 1943.

The question presented is whether the trial court erred, in a trial without a jury, in concluding that a loss resulting from the sale of a piece of improved real estate by the taxpayer in 1944 constituted a loss "attributable to the operation of a trade or business regularly carried on by" him,[1] and could thus be carried back to 1942 and 1943.

The essential facts may be briefly stated. The taxpayer was a native of Detroit, Michigan, where his father had long been in the real estate business. He went to Florida in 1923, where in 1925 he acquired substantial acreage which he subdivided and made into a townsite with adjacent farm tracts; the collapse of the Florida real estate boom followed soon thereafter, and taxpayer continued to improve and sell off the lots and farms in the vicinity of the town Kossuthville over the succeeding 27 years; this activity undoubtedly was sufficient to warrant a finding that he was engaged in at least some of the years in the business of selling real estate in Florida.

The taxpayer's father died in 1927, leaving five lots in a subdivision in Detroit which had not been sold. These lots were left in undivided shares to taxpayer and in trust for his sister. They were residential lots in an area which was becoming undesirable for residential purposes. His interest in the property was originally a one-sixth undivided interest, but was later one-third, and by 1939 he had an outright one-half undivided interest. The property was managed by the Detroit Trust Company, as testamentary trustee for the sister and as agent for appellee.

An effort was made between 1932 and 1935 by taxpayer and the Trust Company, as his agent, to break the

[1] I.R.C. 1939 as amend. §122(d)(5), 26 U.S.C.A. §122 (1952 ed.)

restrictions to residential use affecting these lots. This was done by the building of a filling station on one of the lots and inviting litigation that ended successfully in 1935 or 1937. This lot was leased thereafter until it was sold in 1944. It was this sale at a loss that is here in question.

During the intervening years taxpayer acquired and operated orange groves and other properties in Florida and was a partner in a general merchandise store in Grosse Point, Michigan, which he visited occasionally. He was also a tire dealer and owned some garage property in Florida. He was divorced in 1940 and conveyed all of his Michigan property, including the lot in question, to the Bankers Trust Company of Detroit, as trustee, to secure the punctual performance of his alimony agreement to pay $3,000 a year to his wife. The conveyance gave the trustee the right to sell such property as necessary to provide for punctual payment, but it also provided that the taxpayer might substitute other property if, in the opinion of the officers of the trustee, this would "entirely and safely secure the punctual payments of the" required sums.

In 1944 this filling station lot was sold by the taxpayer and/or the Bankers Trust Company as to his interest, and by the Detroit Trust Company as to the sister's interest. In the same year taxpayer sold several Florida tracts. They were all sold at a loss.

The only question here is whether the Detroit filling station property was property held in a trade or business regularly carried on by him. This question is the same as that presented when a taxpayer sells at a profit property that he claims he has held as a capital asset, but which, the Government contends, is a sale of property

primarily held for sale to customers in the ordinary course of trade or business[2] Many cases have been decided by this Court in which that question has been posed. In much the greater number, the positions of the parties and the contentions made by them are reversed from that in which the taxpayer and the Director now find themselves. If such property is sold at a profit it is to the interest of the taxpayer to claim that such property is a capital asset, and the Government attempts to have it found to be property held primarily for sale to customers, because tax rates for capital gains are, of course, much more favorable to the taxpayer.

We have repeatedly held that where there is no dispute as to the basic evidentiary facts (and there is none here) and nothing remains but for the trial court to apply the process of reasoning to achieve a correct interpretation of the legal significance of the evidentiary facts, such conclusion as the trial court reaches as an "ultimate fact" is subject to review, not as we review a finding of fact, but freed of the restraint of the "clearly erroneous" rule. The clearest statement of this principle is contained in *Galena Oaks Corp. v. Scofield* (5 Cir.), 218 F. 2d 217, 219. It was reiterated in *Goldberg v. C.I.R.* (5 Cir.), 223 F. 2d 709, and most recently applied in *Consolidated Naval Stores Co. v. Fahs* (5 Cir.), 227 F. 2d 923, 925.

In the Goldberg case and in *Smith v. Dunn* (5 Cir.), 224 F. 2d 353, we outlined certain tests that may appropriately be applied to a fact situation in one of these cases as a guide to a correct determination of this troublesome question. We need not list them again. Nor do we cite the many other cases decided in this circuit from

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[2] 26 U.S.C.A. §117(j)(1) (1952 ed.).

which a recognizable pattern of decisions has resulted. These are all cited in *Smith v. Dunn, supra.*

We have no doubt that if the sale of the Detroit lot here in question had resulted in gain to the taxpayer and he appeared before this Court urging that the sale was of a capital asset and was not of "property held by him primarily for sale to customers in the ordinary course of his business," we would feel that the precedents in this circuit would constrain the Court to agree with the taxpayer and against the Government. Obviously, we can hold no differently with the parties in reverse positions.

Coupling the complete lack of any real estate business conducted by the appellee in Michigan during the year 1944, or in fact at any time, with the circumstance that this property was at all times here relevant put to the highly personal and restricted use of standing as security for his alimony payments and with actual legal title in a trustee for that purpose, produces a result that cannot justify a finding by the trial court or by us that this lot was held by the taxpayer for sale in the conduct of any business regularly engaged in by him.

The judgment must be reversed and entered for the appellant.

REVERSED and RENDERED.

A True Copy:
Teste:
(Seal: United States Court of
Appeals, Fifth Circuit)

CLARA R. JAMES
Deputy Clerk of the United States
Court of Appeals for the Fifth
Circuit.

JUDGMENT.

Extract from the Minutes of November 30, 1956.

JOHN L. FAHS, individually and as United States Collector of Internal Revenue for the District of Florida,

No. 15946 versus

DeWITT E. TAYLOR.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for the appellant, John L. Fahs, individually and as United States Collector of Internal Revenue for the District of Florida.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 807

DEWITT E. TAYLOR, PETITIONER

v.

JOHN L. FAHS, Individually and as United States Collector of Internal Revenue for the District of Florida

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court rendered no opinion. Its findings of fact and conclusions of law (Pet. 1A-5A) are not reported. The opinion of the Court of Appeals (Pet. 6A-10A) is reported at 239 F. 2d 224.

JURISDICTION

The judgment of the Court of Appeals was entered on November 30, 1956. (Pet. 11A.) The petition for a writ of certiorari was filed on February 28, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals correctly held that a loss sustained by the taxpayer from the sale of real estate was not attributable to the operation of a trade or business regularly carried on by him and, therefore, that he was not entitled to a net operating loss carryback under Section 122 of the Internal Revenue Code of 1939.

STATUTE INVOLVED

The relevant portions of Sections 23(s) and 122(a), (b)(1), (c) and (d) (4) and (5) of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 8-10.

STATEMENT

The basic evidentiary facts in this case are undisputed. (Pet. 9A.)

The taxpayer is an individual residing in Polk County, Florida. (Pet. 1A.) He was a native of Detroit, Michigan, where his father had long been in the real estate business. He moved to Florida in 1923, where, in 1925, he acquired substantial acreage which he subdivided and made into a townsite with adjacent farm tracts. The collapse of the Florida real estate boom followed soon thereafter, and he continued to improve and sell off the lots and farms in the vicinity of the town over the succeeding twenty-seven years. (Pet. 7A.)

The taxpayer's father died in 1927, leaving five lots in a subdivision in Detroit, Michigan, which had not been sold. These lots were left in undivided shares to the taxpayer and in trust for his sister. They were residential lots in an area which was becoming undesirable for residential purposes. His interest in the property was originally a one-sixth undivided interest but later

was one-third, and by 1939 he had an outright one-half undivided interest. The property was managed by the Detroit Trust Company, as testamentary trustee for the sister and as agent for the taxpayer. (Pet. 7A.)

An effort was made between 1932 and 1935 by the taxpayer and the Trust Company, as his agent, to break the restrictions to residential use affecting these lots. This was done by the building of a filling station on one of the lots and inviting litigation that ended successfully in 1935 or 1937. This lot was leased thereafter until it was sold in 1944. (Pet. 7A-8A.)

During the intervening years, the taxpayer acquired and operated orange groves and other properties in Florida and was a partner in a general merchandise store in Grosse Point, Michigan, which he visited occasionally. He was also a tire dealer and owned some garage property in Florida.

The taxpayer was divorced in 1940 and conveyed all of his Michigan property, including the filling station lot in Detroit, to the Bankers Trust Company of Detroit, as trustee, to secure the punctual performance of his alimony agreement to pay $3,000 a year to his wife. The conveyance gave the trustee the right to sell such property as necessary to provide for punctual payment. It also provided that the taxpayer might substitute other property if, in the opinion of the officers of the trustee, this would "entirely and safely secure the punctual payments of the" required sums. (Pet. 8A.)

In 1944, the filling station lot in Detroit was sold at a loss by the taxpayer and/or the Bankers Trust Company as to his interest, and by the Detroit Trust Company as to his sister's interest. In the same year the taxpayer sold at a loss several Florida tracts. (Pet. 8A.)

The sole question presented in this suit for refund is whether the loss of $23,307.29 occasioned by this sale, in 1944, of the filling station lot in Detroit was attributable to the operation of a trade or business regularly carried on by the taxpayer and thus constituted a net operating loss which he is entitled to carry back to the years 1942 and 1943 under Section 122 of the Internal Revenue Code of 1939. (Pet. 4A, 8A.) The district court held that the taxpayer is entitled to the net operating loss deduction claimed. (Pet. 5A.) The Court of Appeals for the Fifth Circuit reversed. (Pet. 6A-11A.)

ARGUMENT

1. The decision of the Court of Appeals is correct and turns upon the particular facts of the case, all of which are uncontroverted. As above noted, the single issue presented is whether the loss sustained by the taxpayer from the sale, in 1944, of the filling station lot in Detroit was attributable to the operation of a trade or business regularly carried on by him within the meaning of Section 122(d)(5) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 10). If not, the deduction of the loss under the net operating loss carryback provision is precluded by the exceptions and limitations provided in that section.

The record discloses that the taxpayer inherited an undivided interest in the Detroit property from his father. (Pet. 2A.) Thus, the acquisition of the property was entirely unrelated to the operation of any trade or business by the taxpayer. Moreover, the taxpayer did not thereafter hold or use the property in connection with the operation of any trade or business. On the contrary, the property was not held by the taxpayer at all during the pertinent years, since it was

conveyed by him in 1940 to the Bankers Trust Company of Detroit to secure the punctual performance of his agreement to pay alimony to his former wife, and it was held by that institution until it was sold in 1944. (Pet. 8A.) While the taxpayer may have been in the business of subdividing and selling real estate in Florida where he lived, it is clear that his acquisition and holding of the Detroit property were in no way connected with his Florida real estate operations.[1] Although the taxpayer was a member of a partnership which operated a general store in Michigan (Pet. 3A), there is no evidence that he was engaged in the real estate business in Michigan, either when the Detroit property was sold or at any other time[2] (Pet. 10A). The undisputed evidence, therefore, fully supports the conclusion reached by the court below that the Detroit property was not related to the operation of any trade or business by the taxpayer.

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[1] The district court found, negatively, that (Pet. 3A) "there is no evidence that he [taxpayer] intended to handle the Detroit property in any way differently than he handled his Florida property which admittedly was being sold in the usual course of a going real estate business." Of course the taxpayer, as plaintiff in this refund suit, had the burden of proof and the significant fact is that there is no evidence that the Detroit property had any connection with or relationship whatever to the taxpayer's activities in the subdivision and sale of land in Florida. On the contrary, the manner in which the property was acquired and used indicates the absence of any such relationship.

[2] The district court mistakenly took the view that, since the taxpayer's father had been in the real estate business in Detroit and the property involved was a remnant of a subdivision held by him as a real estate dealer, the taxpayer must be considered as having continued his father's real estate business. (Pet. 4A-5A.) Evidence as to the business of the taxpayer's father does not, of course, establish anything so far as the taxpayer's business is concerned, and the taxpayer's one real estate transaction in Detroit establishes, at most, an isolated transaction. Cf. *Dalton* v. *Bowers*, 287 U. S. 404; *Burnet* v. *Clark*, 287 U. S. 410.

2. The Court of Appeals did not exceed the proper scope of review. The district court's conclusion that the taxpayer is entitled to the net operating loss carry-back deductions sought (Pet. 5A) is contrary to the undisputed facts and is premised fundamentally upon negative findings as to the absence of evidence (Pet. 3A, 5A) which, at best, disclose that the taxpayer failed to sustain his burden of proof. The evidentiary facts are uncontroverted and are not such as are reasonably susceptible of conflicting inferences. As the Court of Appeals said (Pet. 10A):

> Coupling the complete lack of any real estate business conducted by the appellee in Michigan during the year 1944, or in fact at any time, with the circumstance that this property was at all times here relevant put to the highly personal and restricted use of standing as security for his alimony payments and with actual legal title in a trustee for that purpose, produces a result that cannot justify a finding by the trial court or by us that this lot was held by the taxpayer for sale in the conduct of any business regularly engaged in by him.

Accordingly, the Court of Appeals correctly reversed the judgment of the district court. *United States* v. *Gypsum Co.*, 333 U.S. 364, rehearing denied, 333 U.S. 869; *Orvis* v. *Higgins*, 180 F. 2d 537 (C.A. 2d), certiorari denied, 340 U.S. 810; *Dollar* v. *Land*, 184 F. 2d 245 (C.A. D.C.), certiorari denied, 340 U.S. 884.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

A. F. PRESCOTT,
WALTER AKERMAN, JR.,
Attorneys.

MARCH 1957.

APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(s) [As added by Sec. 211(a), Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

[26 U.S.C. 1952 ed., Sec. 23.]

SEC. 122 [As added by Sec. 211(b), Revenue Act of 1939, *supra*]. NET OPERATING LOSS DEDUDTION.

(a) [As amended by Sec. 105(e)(3)(A), Revenue Act of 1942, c. 619, 56 Stat. 798] *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [As amended by Sec. 153(a), Revenue Act of 1942, *supra*] *Amount of Carry-Back and Carry-Over.*—

(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding

taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6) and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * * *

(c) [As amended by Secs. 105(e)(3)(B) and 153(b), Revenue Act of 1942, *supra*] *Amount of Net Operating Loss Deduction.*—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d)(1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26(e));

(d) [As amended by Sec. 105(e)(3)(C), Revenue Act of 1942, *supra*] *Exceptions, Additions, and Limitations.*—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

* * * * *

(4) [As amended by Sec. 150(e), Revenue Act of 1942, *supra*] Gains and losses from sales or exchanges of capital assets shall be taken into account without regard to the provisions of section 117(b). As so computed the amount deductible on account of such losses shall not ex-

ceed the amount includible on account of such gains.

(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph deductions and gross income shall be computed with the exceptions and limitations specified in paragraphs (1) to (4) of this subsection.

* * * * *

(26 U.S.C. 1952 ed., Sec. 122.)

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